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IN THE

Supreme Court of the United States

October Term, 1964

No. 854

LORENE M. SWAIN, as Executrix of the Last Will and Testament of WILLIAM T. SWAIN, Deceased,

—and—

KATHRYN S. FREEMAN, as Administratrix of the Estate of EDGAR A. FREEMAN, Deceased,

—and—

RETA JEBERJAHN, as Executrix of the Last Will and Testament of FRED W. JEBERJAHN, Deceased,

—and—

DOROTHY G. JOB, as Executrix of the Last Will and Testament of HARRY C. JOB, Deceased,

—and—

MARION ANDERSON, as Administratrix of the Goods, Chattels and Credits of ARTHUR ANDERSON, Deceased,

Petitioners,

—vs.—

BOEING AIRPLANE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. .....

LORENE M. SWAIN, as Executrix of the Last Will and Testament of WILLIAM T. SWAIN, Deceased,

—and—

KATHRYN S. FREEMAN, as Administratrix of the Estate of EDGAR A. FREEMAN, Deceased,

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Petitioners,

—vs.—

BOEING AIRPLANE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Lorene M. Swain, as Executrix of the Last Will and Testament of William T. Swain, Deceased; Kathryn S.

Freeman, as Administratrix of the Estate of Edgar A. Freeman, Deceased; Reta Jeberjahn, as Executrix of the Last Will and Testament of Fred W. Jeberjahn, Deceased; Dorothy G. Job, as Executrix of the Last Will and Testament of Harry C. Job, Deceased; and Marion Anderson, as Administratrix of the Goods, Chattels and Credits of Arthur Anderson, Deceased, respectfully pray for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, entered herein on October 27, 1964, unanimously affirming the judgments of the United States District Court for the Southern District of New York, entered January 17, 1964, after jury verdict, dismissing their complaints against respondent Boeing Airplane Company.

Opinions Below

The opinion of the Court of Appeals is reported at 337 F. 2d 940 (2d Cir. 1964) and a copy thereof is appended to this petition. The opinion of the District Court is not officially reported, but a copy of this opinion is appended to this petition and is also reproduced in the plaintiffs-appellants' appendix to their brief in the Court of Appeals, at page 12a.

Grounds of Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1). The judgment of the United States Court of Appeals for the Second Circuit was dated and entered on October 27, 1964. No rehearing was sought in the Court of Appeals.

Questions Presented

1. When a District Judge forces counsel to argue objections to the jury instructions within the hearing of the jury, in violation of Rule 51, Federal Rules of Civil Procedure, after counsel has made a proper request for argument outside of the hearing of the jury, does this not "affect the substantial rights of the parties" within the meaning of 28 U. S. C. §2111?

2. Is it not reversible error for a District Judge to force counsel to argue objections to the jury instructions within the hearing of the jury, in violation of Rule 51, Federal Rules of Civil Procedure, after counsel has made a proper request for argument outside of the hearing of the jury?

3. Was there not prejudicial error in this case, during the colloquy conducted within the hearing of the jury in violation of Rule 51; in erroneous instructions given to the jury; and in the refusal to charge numerous requests submitted by petitioners?

Rule and Statute Involved

Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C., reads as follows:

"Rule 51. *Instructions to Jury: Objection.*

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court

shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

28 U. S. C. Section 2111 provides as follows:

"§2111. *Harmless error.*

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, §110, 63 Stat. 105."

Statement of the Case

This review is sought by petitioners Swain, Freeman, Jeberjahn, Job and Anderson of a consolidated judgment of the United States Court of Appeals for the Second Circuit, dated and entered on the 27th day of October, 1964, which unanimously affirmed separate judgments entered in each of the five actions on January 17, 1964, after jury verdict, dismissing their complaints against respondent Boeing Airplane Company (App. 5a-11a). Petitioners' appeals to the Court of Appeals were also from orders of the trial court, the United States District Court for the Southern District of New York, denying their motions for (a) judgment *non obstante veredicto* on the question of liability, and, in the alternative, (b) a new trial on all issues (App. 12a-15a). All "App." references in this peti-

tion are to pages of the Appendix to Plaintiffs-Appellants' (petitioners herein) Brief in the Court of Appeals.

These five actions arose out of the crash of a Boeing 707-123 jet aircraft manufactured and sold by the respondent to American Airlines, Inc. The District Court's jurisdiction in each of these actions was based upon 28 U. S. C. §1332(a)(1). The crash occurred near Calverton, Long Island, New York, on August 15, 1959, while the crew was attempting a simulated "two-engine-out" landing during a training flight. Petitioners are the widows of five decedents, which decedents were all employees of American Airlines, Inc. and were the sole occupants of the airplane at the time of the crash. Decedent Job was the pilot-in-command of the flight, and served as pilot instructor for decedents Swain and Jeberjahn, who were taking crew training for qualification as Captains, for scheduled passenger service in the Boeing 707 aircraft. Decedent Anderson was a flight engineer instructor, giving similar crew qualification training to decedent Freeman, a flight engineer trainee.

The Boeing 707-123 aircraft involved, U. S. registry number N7514A, had been delivered to American Airlines by Boeing about June 5, 1959, slightly more than two months prior to the date of the fatal accident (App. 20a).

It was contended in the courts below by petitioners that the aircraft was negligently designed and manufactured by respondent in that the rudder, tail and rudder controls were "under-designed", so that they did not afford the necessary directional and lateral control, particularly during maneuvers involving the loss of power from two engines (known as "two-engine-out procedures") The fatal accident occurred during a practice landing approach to Peconic River Airport, when the crew was practicing a

two-engine-out landing, which was a required training maneuver known to respondent Boeing to be used by all airlines.

Petitioners also contended that the design of the tail, rudder and rudder controls was defective, in that the rudder control was not "boosted", thus requiring excessive control pressures by the pilots; that the area of the vertical stabilizer and rudder was insufficient; that the rudder travel was inadequate; the rudder feel was deceptive and required excessive forces; and other defects, which were later remedied by extensive modifications made after this accident, but which were admitted to be practicable and feasible prior to the date of the crash (App. 70a-73a).

Petitioners further contended that even if respondent were not negligent in the design and manufacture, that it breached the implied warranty of fitness by selling this aircraft with such defects in it. Further, petitioners contended that even if there were no defect in the airplane, that respondent had knowledge of the dangerous condition which developed during the two-engine-out landings, the very maneuver involved in this crash, but failed to adequately warn of this danger, and therefore was liable for negligent failure to warn, even without an actual defect.

The alleged error occurred at the end of the trial court's charge to the jury wherein the following took place:

> "The Court: . . . I will now submit the case to you with complete confidence that you will reach a fair, impartial and just verdict.
>
> *Are there any exceptions to the charge?*
>
> *Mr. Geoghan: May we approach the bench, your Honor?*

The Court: No. Are there any exceptions to the charge?" (App. 190a; emphasis supplied.)

Petitioners urge in this application that the trial court committed reversible error by refusing to allow petitioners' counsel, Mr. Geoghan, to argue objections to the charge to the jury outside the hearing of the jury and by forcing petitioners' counsel to argue such objections within the hearing of the jury, all in violation of the last sentence of Rule 51 of the Federal Rules of Civil Procedure, and that the Court of Appeals was in error in affirming notwithstanding the actions of the trial court in this respect.

It is petitioners' contention that the violation of the mandatory language of the last sentence of F. R. Civ. P. 51 requires a reversal of the judgment below and that such violation was in itself prejudicial to petitioners. It is petitioners' further contention that even if prejudice is required to be affirmatively shown, such prejudice clearly exists and has been shown to affect petitioners' substantial rights to a fair and impartial trial on the issues raised in the actions.

ARGUMENT

POINT I

The Court of Appeals perpetuated and petrified the prejudicial error committed by the trial court's flat refusal, in violation of Rule 51, of the request of petitioners' counsel to make objections to the charge outside the hearing of the jury.

The Court of Appeals had decided an important question of federal law arising under Rule 51 of the Federal Rules of Civil Procedure which has not been, but should be, settled by this Court.

Rule 51 of the Federal Rules of Civil Procedure reads as follows:

> "Instructions to Jury: Objection. At the close of the evidence, or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the court instruct the jury on the law set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error *the giving or failure to give an instruction* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. *Opportunity shall be given to make the objection out of the hearing of the jury.*" [Emphasis supplied.]

In considering the question raised on this application it is believed that a background summary of the proceedings in the trial court will be of assistance to this Court.

Trial Court Proceedings

Both as to petitioners' claims of negligence and breach of warranty, the only defense presented by Boeing was that of contributory negligence, and that defense was withdrawn at the close of Boeing's case after plaintiffs (petitioners herein) moved to dismiss it for lack of evidence (App. 151a-152a). As to proximate cause, all causes other than Boeing's negligence or breach of warranty were eliminated by admissions and uncontroverted evidence, as will be shown below.

The issues in the case were narrowed considerably by Boeing's admissions in answers to four interrogatories propounded by plaintiffs, all of which were read into the record at the trial.

Interrogatory #15 read:

> "Does defendant know of any negligent act or omission to act by American Airlines, Inc., its officers or employees, which may have caused or contributed to the causing of the crash of N7514A on August 15, 1959?"

The answer was:

> "No, not at the present time." (App. 22a)

Interrogatory #16 read:

> "Does the defendant know of any negligent act or omission to act by employees of the United States Government, which may have caused or contributed to the cause of the crash of N7514A on August 15, 1959?"

The answer was:

> "No, not at the present time." (App. 22a)

Interrogatory #17 read:

> "Does the defendant know of any other negligent act or omission to act by any person or persons other than the defendant or those mentioned in the two preceding interrogatories, which may have caused or contributed to the causing of the crash of N7514A on August 15, 1959?"

The answer was:

> "At the present time, *defendant knows of no negligent act or omission to act by any person or persons.*" (App. 22a; emphasis supplied.)

These answers were never changed or amended at the trial, nor was any contrary evidence introduced by defendant, Boeing. Therefore, it stands as a clear admission in this case that there was no negligent act or omission to act by any of the occupants of this airplane, or anyone other than Boeing, which may have caused or contributed to this accident.

Furthermore, the question of improper use of the defendant's product was taken out of the case by the interrogatories. Interrogatory #19(a) read:

> "At the time of the crash of N7514A, was American Airlines, Inc., or its employees, failing to follow any instructions or recommendations of this defendant for the use, operation or maintenance of the Boeing 707-120 type aircraft, which had been communicated to American by this defendant?"

The answer was:

> "We aren't aware of any." (App. 22a)

This answer was never changed, and there was no contrary proof. Therefore, again by admission, there was no improper use, operation or maintenance of this aircraft which could possibly have been an issue in this case.

Accordingly, this jury could not have been asked to pass upon any questions dealing with the operation of the airplane; the propriety of the maneuver being executed; the proper or improper use of this aircraft; or any issue having to do with any possible negligence on the part of any of the five occupants of this aircraft. This point was made crystal clear at the end of the case when the defendant, confronted with motions by petitioners to dismiss the affirmative defenses of contributory negligence, voluntarily withdrew those issues from the case (App. 151a-152a). Therefore, the issues boiled down to essentially one question: Was there a defect in this aircraft, or was there a failure by Boeing to warn of a condition which would be dangerous without the warning? As will be shown below, all other possible causes of this accident were excluded from the case by admissions, concessions or stipulations, so that the only possible cause of this accident on the record of this trial was the difficulty of controlling this airplane during the prescribed training maneuvers.

It was admitted by Boeing's own accident investigator and Safety Supervisor that there was no indication of any malfunction of any equipment on the aircraft (App. 44a).

It was stipulated that weather was not a factor in this accident (App. 100a).

It was admitted that there was no warning of the dangerous condition given by Boeing prior to the date of this accident (App. 52a).

The defect in this airplane and the failure to warn of a dangerous condition were conclusively established by the introduction into evidence of the Federal Aviation Agency Airworthiness Directive (Plaintiffs' Exhibit "16", App. 55a-58a; 230a) and by the introduction of the Amendment to the Boeing "C.A.A. Approved Airplane Flight Manual" (Plaintiffs' Exhibit "15", App. 50a-51a). It should be noted that these exhibits were received in evidence for all purposes (App. 55a and App. 50a).

The text of the F.A.A. Airworthiness Directive shows conclusively that there was a defect in this airplane prior to the date of this accident; and furthermore, that there was a dangerous condition known to defendant Boeing from prior incidents, which defendant admittedly failed to warn about (see also, App. 82a-84a and 140a-147a). It states in part:

> "The rudder characteristics of this airplane are such that when yaw angles in excess of approximately 10° are attained, *the rudder effectiveness deteriorates quite rapidly with a resultant loss of aircraft directional control. Several incidents have shown that this can produce a dangerous flight condition.*" (App. 55a; emphasis supplied)

This language clearly shows not only the defect, but the fact that "several incidents" have shown the dangerous condition. Therefore, the accident in which the petitioners' decedents were killed is not the only incident which showed the dangerous characteristics of this airplane. Boeing further admitted knowledge of other prior incidents (from their own training and test flights) which showed precisely the same dangerous flight condition (Interrogatory #5, read into the record at App. 61a-62a; the "Gannett" in-

cident, App. 136a-137a; the "Weigell" incident, App. 137a-138a).

The existence of the defect and the negligent failure to warn are further admitted in defendant's own documents pertaining to the Boeing Flight Characteristics Improvement Program (FCIP), as shown in Plaintiffs' Exhibit "1" (App. 75a-78a; App. 221a-229a) Plaintiffs' Exhibit "1", relating to the FCIP program, was "admitted, like most exhibits, for all purposes" in the words of the trial court (App. 78a).

It should be noted that the petitioners did not necessarily have to prove a defect. It was sufficient for them to prove a failure to warn of a known dangerous condition; see Annotation, 76 ALR 2d 9; *McLaughlin* v. *Mine Safety Appliance Co.*, (1962), 11 N.Y. 2d 62, 226 N.Y.S. 2d 407, 181 NE 2d 430, at p. 433, citing numerous earlier New York cases; *Alfieri* v. *Cabot Corp.*, (1st Dept., 1962), 17 App. Div. 2d 752, 235 N.Y.S. 2d 753, at p. 759. The foregoing uncontroverted evidence and admissions constitute a concession that there was a failure to warn of a dangerous condition in this case, and there is absolutely no evidence to the contrary, nor could there possibly be, in view of the fact that this evidence consists of defendant's own admissions and documents, and the mandatory Airworthiness Directive of the United States Government, which recited both the dangerous condition and the specific defect involved.

It was further admitted by Boeing that the rudder pressures were considerably higher than the pilots would like or desire, and that they had pilot compiaints on this subject before the accident (App. 97a; 82a-84a and 140a-147a).

It should also be noted that the opinion of petitioners' expert, Captain Reedholm, that "due to deficiencies that I have observed on the rudder, that it either caused or contributed to the accident", was not controverted any place in the record (App. 127a and 128a).

Actually, the sole argument raised by Boeing was that a number of other pilots had survived two-engine-out landings (see App. 18a). The fact that it was possible for pilots to escape with their lives when practicing two-engine-out landings does not constitute a defense to the claims of the petitioners that there was a defect in this airplane, or that Boeing failed to warn of the dangerous condition when it had knowledge of this condition, in this case where contributory negligence was withdrawn.

Accordingly, we have the unusual situation in this case of a complete mosaic, with a defect in the airplane, and a failure to warn of a dangerous condition being conclusively established by uncontroverted documentary evidence and by admissions of the defendant itself. Whatever slight issue might have remained at the close of defendant's case was removed when defendant conceded the absence of contributory negligence.

Obviously, the trial court misconstrued the effect of the withdrawal of the contributory negligence defense. When contributory negligence went out of the case, it was no longer possible for the defendant to ask the jury to find that any fault on the part of any of the crew members contributed to this accident. The contributory negligence defense was withdrawn as to all five occupants of the aircraft. This means that if the jury found that any one of these five men was negligent, even without naming him, that at least one of the plaintiffs would be defeated on the issue of the decedent's own contributory negligence,

despite the fact that this cause was completely withdrawn from the case. Obviously, the jury could not decide the case on the basis of the negligence of any of the crew members (which would have to be *contributory* at least as to one crew member) when the entire issue of contributory negligence of all five decedents was effectively withdrawn from the case.

A question may well occur: If the petitioners' case was so overwhelming as to furnish grounds for judgment n.o.v., how could the jury have possibly decided to send five widows and ten fatherless children out of court without any compensation?

We believe that the answer lies in the trial court's erroneous handling of the contributory negligence issue, particularly during a prejudicial colloquy held within hearing of the jury right after the main charge, contrary to Rule 51. These prejudicial errors are discussed below in Point II of this petition. As background, it is important to note that the defendant cleverly used an argument of prior safe use as an indirect means of inserting contributory negligence into the case. In his opening statement to the jury (App. 18a, last paragraph) and in his final summation (App. 160a-166a), defendant's counsel argued that because other pilots had safely executed two-engine-out landings hundreds of times, the cause of *this* accident must have been negligence on the part of plaintiffs' decedents. No other conclusion is possible from these arguments, which were actually the sole defense in the case.

With this background of a defense of contributory negligence which was legally out of the case, but actually was being argued as the sole defense, it is apparent from what follows under Point II of this petition that the jurors must have felt that they could find for defendant on the basis

of contributory negligence. The grievous errors of the trial court, particularly during the prejudicial colloquy held in violation of Rule 51, were sufficient to lead even the most intelligent jurors into such a mistake.

Trial Court's Violation of Rule 51

At the end of the trial court's charge, the following took place:

> The Court: . . . I will now submit the case to you with complete confidence that you will reach a fair, impartial and just verdict.
>
> *Are there any exceptions to the charge?*
>
> *Mr. Geoghan: May we approach the bench, your Honor?*
>
> *The Court: No.* Are there any exceptions to the charge? (App. 190a; emphasis supplied).

At this point, the trial court had violated Rule 51, by flatly denying Mr. Geoghan's proper request to approach the bench to make his objections to the charge. The request to approach the bench was in direct reply to the court's invitation to state objections to the charge, and at that point in the trial, there was no possible reason for a bench conference other than objections to the charge. All evidence, motions and summations were completed, and the only possible business pending before the court was counsel's reply to the court's request for exceptions to the charge.

After this flat refusal of the trial court to comply with Rule 51, petitioners' counsel was faced with a Hobson's choice. He was immediately placed in the position of having to argue with the court within the hearing of the jury, thus risking a conclusion by the jury that the judge's

position was against the petitioners. If he made any further demands for a conference outside the hearing of the jury, he would first of all make it appear that he had something to hide from the jury; and secondly, based upon the trial court's flat refusal of the first clear request, and the trial court's past unprovoked rebukes and abrupt cutoffs during this trial, he was simply inviting further rebuke at a critical point in the case. [Examples of these prior rebukes are (1) sarcasm, App. 24a-25a; (2) cutoff of argument, App. 43a; (3) sarcasm, App. 44a; (4) cutoff of argument, App. 47a; (5) taking over of witness examination, App. 47a-48a; (6) cutoff of argument, App. 49a; (7) interjection of interim instructions on legal matters during witness examination, causing argument on matters of law within hearing of the jury, App. 92a-94a.]

Realizing the futility of further demands for enforcement of Rule 51, and cognizant of the risks of prejudicial rebuke inherent in such a request to this trial court, petitioners' counsel then had two choices: To argue the objections to the charge and his requests to charge within the hearing of the jury, or to let the errors in the charge go uncorrected. Petitioners had been through a long and expensive trial, three of the five widows coming from their California homes to remain throughout the trial. While petitioners' counsel was fully aware of numerous errors in the given charge, and numerous vital requests to charge which were not given, he was forced to choose the lesser of two evils. It was apparent from the past actions of this trial court that argument on points of law within the hearing of the jury would be handled without regard to the prejudicial effects thereof. While the charge as given was highly prejudicial to petitioners, counsel had so little to gain by attempting to argue against the charge within the hearing of the jury, and so much to lose

through the court's continued violation of Rule 51, that he was compelled to pass up objections to the given charge, and preserve the points for appeal as unobtrusively as possible by taking exception to the court's failure to charge petitioners' requests. This is recorded in the minutes of the trial immediately following the above-quoted violation of Rule 51 by the trial court:

> Mr. Geoghan: May I just confer for a moment?
> The Court: Yes.
>
> (Mr. Geoghan confers with Mr. Law [associate counsel for plaintiffs] off the record.)
>
> Mr. Geoghan: If your Honor please, I except—let me put it this way: We did submit a list of written charges. I assume they will be marked as a court exhibit, just for the record.
>
> The Court: They will be marked as a court exhibit, and I have incorporated the substance of a great number of them, not in your language but in my own language.
>
> Mr. Geoghan: That is correct. I think there may be a few—
>
> The Court: If there is an exception to anything I omitted that you think is substantial, let me know now. What is it? Refer to it by number, if you wish. (App. 190a).

There then followed a further colloquy covering eight pages of the record, which resulted in the argument of numerous points of law within the hearing of the jury; the compounding of prejudicial error; and, among other things, the interjection of contributory negligence into the case, even though it had been withdrawn as a defense. The above quotation shows that the trial court cut off the attempt of petitioners' counsel to unobtrusively object

to failure to charge as requested, and persisted in its continuing violation of Rule 51 by forcing detailed arguments within hearing of the jury. While the court's request for detailed objections would have been perfectly proper if the proceedings were being conducted outside the jury's hearing in accordance with Rule 51, this was not the case here. Petitioners' counsel was forced to "walk on eggs", clinging to his valid objections to an erroneous given charge, but trying desperately to avoid the jury prejudice which would follow from any overt indication that the court's position was not in harmony with that of the petitioners.

The trial court's direction to "refer to it by number, if you wish", did not cure the prejudicial error, since the petitioners were put into the position of seeming to be in conflict with the judge, regardless of whether requests to charge were denied by number, or by words. Furthermore, as will be shown below, the violation of Rule 51 led directly into a highly prejudicial colloquy involving not mere numbers, but words, which revived the dead defenses of contributory negligence.

This situation is a classic example of the wisdom of Rule 51, and shows why its last sentence is mandatory. So far as is known, this is the only provision anywhere in the rules which absolutely requires a conference outside the hearing of the jury. The reason for this strong and unusual rule is apparent: When placed in this inherently prejudicial position, counsel is "damned if he does and damned if he doesn't".

In denying petitioners' motion for a new trial based upon the violations of Rule 51, the trial court wrote a memo-

randum decision, dated January 31, 1964, which stated in part:

> "Plaintiffs also seek a new trial on the ground that the opportunity should have been given to the plaintiffs to make objections to the charge out of the hearing of the jury. Plaintiffs' counsel asked for no such opportunity. If he had asked for it it would have been granted pursuant to Rule 51 of the Rules of Civil Procedure.
>
> After the charge had been completed, the Court asked whether there were any exceptions to the charge. Mr. Geoghan then said: 'May we approach the bench, your Honor?' The Court said: 'No. Are there any exceptions to the charge?' Mr. Geoghan then stated: 'We did submit a list of written charges. I assume they will be marked as a court exhibit, just for the record.' The Court replied: 'They will be marked as a court exhibit, and I have incorporated the substance of a great number of them, not in your language, but in my own language.' Mr. Geoghan then said: 'That is correct. I think there may be a few—' (R. p. 771).
>
> *Obviously, Mr. Geoghan was objecting to failure to grant some of his proposed request to charge.* The Court then said: 'If there is any exception to anything I omitted that you think is substantial, let me know now. What is it?' (R. pp. 771-772).
>
> Mr. Geoghan then particularly excepted to failure to charge certain requests submitted to him. The Court ruled upon his exceptions, granting some of them and denying some of them. He made no other objections to the charge. He then said: 'I think that is all. Thank you, your Honor.' (R. p. 773).
>
> *A request to approach the bench is not a request to make objections to a charge out of the presence*

> *of the jury.* If such request had been made, the Court, with counsel, would have retired to the robing room. *The Court had no indication of what Mr. Geoghan had in mind. He, apparently, had in mind objections to the Court's failure to charge some of his proposed requests to charge.* His objections were ruled upon by the Court and when that had been done Mr. Geoghan said: 'That is all.'
>
> This was a proper compliance with Rule 51." [App. 13a-15a; emphasis supplied].

It is respectfully submitted that this explanation merely confirms the trial court's prejudicial errors.

First of all, in the second paragraph quoted above from the trial court's memorandum decision, a significant part of the record has been omitted. After the trial court refused the application to approach the bench by saying: "No. Are there any exceptions to the charge?", Mr. Geoghan did not immediately state "We did submit a list of written charges". He first stated: "May I just confer for a moment?", and the record shows that with the court's permission he conferred with his associate counsel, Mr. Law [App. 190a]. This conference was held for the purpose of deciding whether or not to press objections to the given charge in front of the jury, in light of the court's refusal to comply with Rule 51. It was only after such conference that Mr. Geoghan decided to limit his oral objections to an unobtrusive exception to the failure to charge petitioners' requests, for the reasons previously stated.

Secondly, the trial court's memorandum decision first states that "Obviously, Mr. Geoghan was objecting to failure to grant some of his proposed requests to charge", and then states that "The Court had no indication of what

Mr. Geoghan had in mind." It is respectfully submitted that there was no reason for the court to speculate as to what Mr. Geoghan had in mind. When the request to approach the bench was made, in direct reply to the court's invitation for exceptions to the charge, Rule 51 required that the court conduct a conference outside the hearing of the jury so that the court could learn exactly what objections were on counsel's mind. It is inherent in Rule 51 that counsel need not risk the fates of five widows and ten fatherless children by placing himself in a position of opposition to the judge within the sight and hearing of the jury.

The trial court's holding that "a request to approach the bench is not a request to make objections to a charge out of the presence of the jury" is directly opposite to the holding of the Court of Appeals for the Ninth Circuit in *Cosper* v. *Southern Pacific Co.*, 298 F. 2d 102 (1961, CA 9 Ariz.), at page 104:

> "The last sentence of Rule 51 provides, 'Opportunity shall be given to make the objection out of the hearing of the jury.' *The 'objection' referred to in this sentence is that set forth in the previous sentence of the rule* which requires that counsel state 'distinctly the matter to which he objects and the grounds of his objection.' We do not interpret this to mean that the judge must invite criticism of his instructions. If counsel desires to object he should so *indicate. He could say, 'May we approach the bench?'* or 'We desire to discuss a matter with the court' or any one of a number of statements *that would indicate to the court that he desired to make an objection.* By doing so counsel is not placed in the attitude of any apparent antagonism to the trial judge as appellant apparently contends. When such *indication* has been made the court, of

course, should give counsel the opportunity of detailing the points of their objection out of the hearing of the jury in accordance with Rule 51" [emphasis supplied].

It is to be noted that the Court below agreed with this procedure by stating, 337 F. 2d at 942-943:

". . . we nevertheless believe that the request was sufficient and that counsel was warranted in thinking that permission to take exceptions out of the hearing of the jury had been denied; we agree with other circuits that trial judges should be alert *to further the important objective of the final sentence of Rule 51.* See *Downie* v. *Powers,* 193 F. 2d 760, 767 (10 Cir. 1951); *Swift* v. *Southern R.R.,* 307 F. 2d 315, 320-21 (4 Cir. 1962)." [emphasis supplied]

As stated by Judge Murrah in *Downie* v. *Powers,* (1951, CA 10 Okla.) 193 F. 2d 760, at 767:

"The purpose of this rule [51] is to afford counsel full opportunity to state frankly and fully his objections to the instructions without influencing or confusing the jury on matters about which it has no concern."

For other authorities holding that a request to "approach the bench" invokes Rule 51, see *Bostwick* v. *United States,* 218 F. 2d 790 (5th Cir. 1955), footnote 1; and see also, Barron & Holtzoff, Federal Practice & Procedure (Wright Edition, 1961), §1103, 1963 Pocket Part, which states that the usual practice is to keep the jury in the box while objections are noted at a bench conference out of the hearing of the jury.

See also, Ohlinger's Federal Practice, Vol. 3, page 646; Moore's Federal Practice (2d Edition), §51.02; Barron &

Holtzoff, Federal Practice and Procedure (Wright Edition, 1961), Vol. 2B, §1103, page 457.

The Fourth Circuit has gone even further in strict enforcement of Rule 51 to avoid prejudicial posture. As stated in *Swift* v. *Southern R. Co.*, (1962, CA 4 NC), 307 F. 2d 315 at 320:

> "Counsel, for a number of reasons, may be reluctant to make a request, in the presence of the jury, that the jury be excused for discussion of an objection to the court's charge. The court should take the initiative. It can excuse the jury and thus afford counsel the opportunity contemplated by the Rule. If, in a routine case, that be thought a needless inconvenience of the jury, the court can summon counsel to the bench or to the judge's chamber and privately inquire if there are objections."

The above language is quoted to show judicial recognition of the extreme prejudice inherent in pressing a request for a secret conference on jury instructions.

Although the Court below agreed that the trial court's refusal to hear objections to the charge out of the hearing of the jury was a violation of Rule 51, it held that it did not necessarily follow that a failure to comply with the direction in the last sentence of Rule 51 automatically required reversal. In so holding the Court relied upon the harmless error statute, 28 U. S. C. § 2111, which, it was said, "embodies a policy at least as important" as Rule 51. Section 2111 provides:

> "§ 2111. Harmless error
>
> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an

examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, § 110, 63 Stat. 105."

The purpose of the harmless error statute is, of course, to prevent reversal for mere technical errors. See, *Dixon* v. *United States,* 7 F. 2d 818 (C. C. A. Okla. 1925). However, the statute itself makes it clear that it was not intended to deprive a litigant of a substantial right in the trial of a civil or criminal case. See, *University City* v. *Home Fire & Marine Ins. Co.,* 114 F. 2d 288 (C. C. A. Mo. 1940); cf. *Kotteakos* v. *United States,* 328 U. S. 750 (1946). In referring to Judge Haynsworth's language in *Swift* v. *Southern R.R.,* 307 F. 2d at 321, the Court below erroneously assumed that the extreme prejudice resulting from the trial court's violation of the last sentence of Rule 51 was cured by relieving petitioners' counsel of the necessity of making the required objection to the charge under that Rule. This assumption not only overlooks the fact that the waiver of the necessity of complying with a procedural rule could not possibly erase the prejudice created by the violation, but it also overlooks the fact that such waiver was entirely unnecessary because petitioners' counsel did in fact comply with the requirement of Rule 51 by making exceptions to the charge of the court—but in the presence of the jury (App. 190a-195a). However, in so doing, petitioners' counsel was walking on eggs, having been forced by the court's violation of Rule 51 to make some objections while attempting to avoid prejudicial posture in front of the jury. The fact that petitioners' counsel remained courteous and did not openly indicate any further differences with the court's position, certainly cannot be deemed an acquiescence on his part to the trial court's actions.

The trial court's actions were clearly prejudicial in this respect. The last sentence of Rule 51 was designed to avoid the very situation faced by petitioners' counsel in the trial court. The language of the rule is mandatory. By compelling trial counsel to state his objections in the presence of the jury it deprives him of the opportunity to state them frankly and fully without influencing or confusing the jury on matters about which it has no concern, *Downie* v. *Powers, supra,* at 767. To say that this is "harmless error" or that it is not prejudicial is to render the last sentence of Rule 51 meaningless. It is indeed difficult to understand the purpose of the last sentence of this Rule, if it can be so easily avoided by reference to the harmless error statute. Certainly, it is not "harmless error" for a trial court to force petitioners' counsel to actually take exceptions to the charge within hearing of the jury after a proper request has been made (as conceded by the Court below) for an opportunity to object outside the jury's presence. Yet, under the Court of Appeals' decision in this case very few, if any, cases could be reversed because of a trial court's violation of the last sentence of Rule 51.

This case is to be distinguished from decisions such as *Nolan* v. *Bailey* (1958, CA 7 Ill.), 254 F. 2d 638 at 640, wherein counsel had no objections to make to the charge and so stated. Here, there were numerous objections, and some of them were made in spite of the great risks involved. It is respectfully submitted that the trial court's violations of Rule 51 were, in themselves, reversible error, since they caused the petitioners to be cast in a prejudicial role of antagonism and contention at the most crucial phase of the trial. This is in addition to the reversible errors pointed out below in II(a), (b) and (c), detailing prejudicial errors in the colloquy, the main charge and the refusal to grant petitioners' requests to charge, all of which resulted from the trial court's violation of Rule 51.

POINT II(a)

The prejudicial colloquy which followed the trial court's refusal to comply with Rule 51, brought contributory negligence back into the case and caused other prejudicial errors to be committed within the hearing of the jury.

The colloquy immediately following the court's refusal to comply with Rule 51 covers nearly eight pages of the record (App 190a-196a). It must be read in light of the violation of Rule 51, which put petitioners in the prejudicial position of arguing questions of law within hearing of the jury.

After the trial court had denied two of petitioners' requested charges within the hearing of the jury (App. 191a-192a), the colloquy within hearing of the jury continued:

> "Mr. Haller [trial counsel for defendant-appellee Boeing]: I had understood from our discussion that *the subject of contributory negligence was not to be covered in the charge.*
>
> The Court: No, that is not right. I said that there was no issue of contributory negligence in this case . . . That is not in the case because we do not know who was running the plane.
>
> *If we knew who was running this plane, then it might be said as to that as to one man he was contributorily negligent and that is what caused the crash,* but that is not in this case, because there is no evidence as to who ran the plane--and I want to make that clear to the jury. *Of course, that does not mean that if whoever was flying the plane was flying it in an improper fashion, and that was the cause of the crash, that the plaintiffs can recover against the defendant.*" (App. 193a; emphasis supplied)

This colloquy clearly injected into the case the issue of contributory negligence, whereas it was agreed by all parties that it was not an issue in the case. This, of course, was highly prejudicial, and again shows the harmful effects of noncompliance with Rule 51.

The trial court first emphasized its oft-repeated theory that the reason that contributory negligence was not an issue in the case was solely because "we do not know who was running the plane". The trial court clearly inferred that if it was simply known who was running the plane, that there would be contributory negligence in the case. There was some evidence of who was flying the airplane (App. 112a-113a) and in any event, the issue of contributory negligence was completely out of the case for all purposes, regardless of defendant's reason for withdrawing it.

When the trial court stated: "Of course, that does not mean that if whoever was flying the plane was flying it in an improper fashion and that was the cause of the crash, that the plaintiffs can recover against the defendant", this clearly meant that the jury could find that if the plane were being flown in an improper fashion which caused the accident, that they could find against the plaintiffs on the issue of contributory negligence. Even if the jurors did not identify who was flying the plane improperly, it is clear that flying a plane in an improper fashion so as to cause a crash, is negligence on the part of one of these five decedents. If one of these five decedents was guilty of negligence, then he would be defeated in his claim by contributory negligence submitted to the jury as an issue in this case, despite the fact that Boeing introduced no evidence of any improper operation of the plane and despite the fact that it withdrew its plea of contributory negligence as to all five decedents. Obviously, this language conveyed the thought to the jury that they could find for the defendant

on the basis of one of the crew members having flown the plane in an improper fashion, so as to cause the accident. Therefore, the issue of contributory negligence was forced back into the case, and this was clearly prejudicial error.

In a 1955 case, the Sixth Circuit Court of Appeals reversed a judgment for the defendant aircraft manufacturer and ordered a new trial of claims arising from a fatal airplane crash, holding that it was reversible e r to instruct the jury on non-existent issues of contributory negligence: *Northwest Airlines, Inc.* v. *Glenn L. Martin Co.*, (1955, CA 6 Ohio) 224 F. 2d 120, reh. den. 229 F. 2d 434, 50 ALR 2d 882, cert. den. 350 U. S. 937, 100 L. Ed. 818, 76 S. Ct. 308, reh. den. 350 U. S. 976, 100 L. Ed. 846, 76 S. Ct. 431. See also, *Clarke* v. *Jackson*, (1938), 342 Mo. 537, 116 SW 2d 122, at 124.

Continuing the prejudicial colloquy within hearing of the jury in violation of Rule 51, the trial court stated:

> *"If, for example, the pilot was making a maneuver which was a completely improper maneuver to make,* which the plane was never designed for, or it was not one in the contemplation of the airplane industry, then of course *you cannot hold the airplane manufacturer* if the plane broke down—any more than if you take an ordinary car and run it at 150 miles an hour." (App. 193a-194a, emphasis supplied)

This statement was erroneous for several reasons. First, such a "completely improper maneuver" would have been contributory negligence by definition. Second, all such issues as to improper maneuvers had been removed from the case not only by the withdrawal of the contributory negligence defenses, but also by Boeing's answers to interrogatories number 15, 17 and 19 (App. 22a). Third, even if there had been evidence that such an improper maneuver

had been made, the jury *could* hold Boeing liable if its negligence or breach of warranty contributed to the accident as a concurrent proximate cause.

It is fundamental that it is error to charge the jury on an issue not raised and supported by the evidence. 53 Am. Jur., Trial, §579, pp. 455, 456, notes 17 and 18 and numerous cases cited; 88 CJS, Trial, §382a, §382b(3), pp. 997 *et seq.*, and particularly p. 1001, n. 13, citing numerous cases of erroneous instructions on contributory negligence not based on evidence. For particularly analogous cases involving negligence, see *Kelly* v. *Collins* (2d Dept. 1937), 252 App. Div. 794, 299 N. Y. S. 152, at 153; *Perry* v. *Dosch-King Co.* (1944), 267 App. Div. 350, 45 N. Y. S. 2d 841 at 842; *McCarthy* v. *Pennsylvania R. Co.*, (1946, CA 7 Ind) 156 F. 2d 877, at p. 882, left column; *Guilford Nat. Bank of Greensboro* v. *Southern R. Co.*, (1963, CA 4 NC) 319 F. 2d 825, at p. 827; *Mandel* v. *Pennsylvania R. Co.*, (1961, CA 2 NY) 291 F. 2d 433, at p. 435.

The trial court plunged further into the prejudicial colloquy, still within the hearing of the jury in violation of Rule 51:

> "The Court: That is not a question of contributory negligence. The question here is, who was responsible for the crash? Was it Boeing who contributed to the crash, or was it something which was not Boeing's fault? If it was not Boeing's fault then they are not liable.
>
> Mr. Haller: Your Honor, I only want to raise the point so that there will be no misunderstanding, to the effect that we had conceded that there had been no error in the operation of the airplane, which I think your Honor has—
>
> The Court: There has been no evidence as to who was operating the plane.

Mr. Geoghan: If your Honor please, in view of these statements I want a charge here that there originally was a defense of contributory negligence, which was withdrawn at the end of the trial—I want that shown.

The Court: That is denied. I do not think what Mr. Haller is talking about here is contributory negligence. He is talking about what was the cause of the crash.

Mr. Geoghan: Yes, but the contributory negligence defense—

The Court: It is not a question of contributory negligence. It is a question of what caused the crash. *Was it the operation of the plane by the pilots on it or was it something defective in the plane? That is really the issue.*" (App. 193a-194a, emphasis supplied)

While the court stated that it did not think Mr. Haller was talking about contributory negligence, Mr. Haller had stated that he was (App. 193a). In any event, whether Mr. Haller was talking about contributory negligence or improper acts of the flight crew which caused the crash, the effect is the same under the law. By definition, *contributory* negligence is negligence which causes the crash. It could not be contributory if it did not cause or contribute to the cause of the crash. Therefore, it is legally impossible to separate "cause" from "contributory negligence", when referring to the operation of this plane by the deceased crew members.

When contributory negligence was withdrawn from the case as to all five occupants of the airplane, this effectively withdrew from the case any issue as to improper operation of the plane being the cause of the crash. Otherwise, we

would have this ludicrous situation: There was no evidence in the case of even *one percent negligence* necessary to sustain contributory negligence, but there was evidence in the case from which the jury could conclude *one hundred percent negligence* by these same crew members! If contributory negligence is out of the case, then the negligence of anyone other than the defendant must be the sole proximate cause of the crash in order to be a defense. At the very least, this situation required the trial court to give a "sole proximate cause" charge, which was requested but refused (App. 195a). Even where such a charge was given, the 7th Circuit reversed a judgment for the defendant where there was no evidence of decedent's negligence. In *McCarthy* v. *Pennsylvania R. Co.*, (1946 CA 7 Ind) 156 F. 2d 877, at p. 882, left column, the court stated:

> ". . . the instruction is improper because it told the jury that the plaintiff could not recover if his decedent was guilty of acts of negligence that solely caused his death. As an abstract proposition of law that is correct, but there was no evidence of any independent acts of negligence by the decedent that were the sole cause of the accident and his death. The court had instructed on a proposition of law about which there was no evidence. *This was bound to confuse and mislead the jury into believing that the concurring acts of the decedent* in continuing to use the defective locomotive after he knew it was defective, and not reporting it, *might be considered as acts of negligence, for which the decedent might be charged with sole liability for the accident. The giving of such instruction under such circumstances was error.*" (Emphasis supplied)

The above-quoted language of the trial court (App. 194a) was further erroneous in stating that "If it was not Boeing's fault then they are not liable," since this com-

pletely disregards the breach of warranty phase of the case which requires no proof of fault. Also, in narrowing the issue in the case down to a choice between "the operation of the plane by the pilots on it or . . . something defective in the plane" (App. 194a-195a), the court erroneously excluded concurrent proximate causes, and excluded recovery by petitioners on their allegations of negligent failure to warn of a dangerous condition, which did not require any proof of "something defective in the plane". Of course, this language about "the operation of the plane by the pilots" was *another* submission of the issue of contributory negligence, since the jury could not consider the operation of the plane as a cause of the accident witout holding at least one of the decedents contributorily negligent.

The aforementioned narrowing down of the causes, so that the jurors had to choose between improper operation by the pilots and a defect in the plane (App. 194a-195a), was clearly reversible error in the light of *Kendrick* v. *Piper Aircraft Corp.*, (1959, CA 3 Pa) 265 F. 2d 482. That case involved wrongful death claims against an aircraft manufacturer, on behalf of the families of two deceased passengers and the one deceased pilot. Although the trial judge in *Kendrick* at first correctly charged the jury on concurrent proximate causation, it was held to be reversible error to later give a charge (in response to defendant's request after the main charge was completed), which removed concurrent causation from the case by requiring the jury to individuate proximate cause. The fact situation in the *Kendrick* case, as well as the language of the trial court's charge, is strikingly similar to the present cases on appeal. In fact, the present cases contain much stronger grounds for reversal than *Kendrick*, for in *Kendrick* contributory negligence had not been withdrawn as a defense; there was only one pilot, instead of five crew members; and there was

some evidence in *Kendrick* which might have supported a conclusion of improper operation of the aircraft. Despite these factors, and despite Chief Judge Goodrich's expressed doubts about the actual effects of the erroneous instructions on the jury, a reversal was unanimously ordered, solely on the basis of the one erroneous charge on causation.

Faced with these disastrous errors, and still walking a tightrope in front of a jury which should not have been there under Rule 51, petitioners' counsel sought to salvage whatever he could in view of the revival of contributory negligence, by requesting a sole cause charge:

> "Mr. Geoghan: Yes, but, if your Honor please, on the question of the operation of the plane, I respectfully request the jury would have to find that this was the sole cause as against the concurrent causes —that is the point I made in my request on the proximate cause issue, in view of this discussion.
>
> The Court: What do you mean 'the sole cause'?
>
> Mr. Geoghan: In other words your Honor did instruct the jury that if there were concurrent causes and one of them was negligence, then the verdict would be in favor of the plaintiff, and I request that in view of the discussion here about the operation of plane.
>
> The Court: I do not understand what you are driving at. I do not know what you want.
>
> Mr. Geoghan: Well, there has been a discussion here about the operation of the plane being the cause of this accident, and I just wanted to request again, if there are concurrent causes and one of them spells breach of warranty or negligence—
>
> The Court: If a cause was the fault of Boeing, why Boeing *can* be liable." (App. 195a; emphasis supplied)

The trial court went on to inject another non-existent issue into the case, the possibility of a bomb placed aboard the plane (App. 195a), but the court never gave the sole cause charge requested. Clearly, petitioners were entitled to such a charge; see, *Kendrick* v. *Piper Aircraft Corp.* (1959, CA 3 Pa) 265 F. 2d 482. It should be noted that petitioners do not claim that even the giving of the sole cause charge would have cured the errors involved, for it is our position that the entire issue of negligence of any of the crew members was out of the case for all purposes. However, in view of the court's erroneous and repeated revival of contributory negligence within the hearing of the jury, petitioners' counsel tried to make the best of a bad situation by mitigating the court's error. Even this attempt was fruitless, since the court apparently did not understand Mr. Geoghan's request that "the jury would have to find that this was the sole cause as against the concurrent causes". If the court itself was confused at this point, imagine the state of mind of the jurors who had been told that contributory negligence was not in the case, but that they should find against the plaintiffs if any of the crew members had improperly operated the airplane!

It was apparent that the longer the colloquy continued, the greater the prejudice to petitioners became, since all of it was conducted within the hearing of the jury in violation of Rule 51. Even the court's grudging concession at the end (App. 195a) was erroneous, in that "if a cause was the fault of Boeing", Boeing *must* be liable, but the court used *can* instead of *must*. thus further implanting the idea that contributory negligence could deefat recovery in this case. Absent contributory negligence. Boeing *must* be liable if a proximate cause was their fault.

As the court below stated in *De Lima* v. *Trinidad Corp.*. (1962, CA 2 NY) 302 F. 2d 585, at 587, a case in which the

trial judge erroneously made a statement as to the vessel owner's use of reasonable care and caution in connection with unseaworthiness, in rejecting the defendant's contention that it was harmless error because other parts of the charge stated the law correctly:

> "We do not agree. The challenged statement was not equivocal or subject to differing interpretations which might be clarified by other portions of the charge. We cannot assume the jury disregarded it. *At best, it was likely to leave the jury highly confused, that alone being ground for reversal.* Moreover, the erroneous instruction was given in a critical portion of the instructions . . . an erroneous statement of the law at that point cannot be described as harmless. As Mr. Justice Frankfurter has said, 'If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge.' Bollenbach v. United States (1946) 326 U.S. 607, 612, 90 L.ed 350, 66 S.Ct. 402." (emphasis supplied)

Also, in *Sunkist Growers, Inc.* v. *Winkler & Smith Citrus Products Co.* (1960, CA 9 Cal) 284 F. 2d 1, at page 23, left column, the court stated:

> "Appellees, of course, urge that the instructions must be 'viewed in their entirety, rather than in isolated segments'; that 'even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge,' . . . We agree with that general principle, *yet if a substantial and prejudicial error is made in the giving of but one instruction, the verdict cannot stand.*" (emphasis supplied)

At the very least, this prejudicial colloquy left the case in a state of confusion as to material points, at the most critical time: The very end of the court's instructions. The jurors' confusion of the issues is illustrated by the question they addressed to the court during their deliberations, as to "whether there were any formal complaints about the rudder assembly in the 707-120 planes" (App. 196a). The trial court answered this question by stating to the jury: "It is up to the jury to consider whether they were formal or informal" (App. 199a). Since there was absolutely no issue in the case about formal or informal notice, the court once again erred prejudicially by confusing and misleading the jurors about an abstract matter not in issue.

It is apparent that the jury must have felt that contributory negligence was a defense in this case. The foregoing colloquy would lead lawyers, as well as laymen, to that conclusion particularly since this was the only defense urged in opening (App. 18a) and summation (App. 161a-166a). It is difficult to understand a jury verdict for a defendant which offered no legally tenable defense, except against the background of the court's prejudicial disregard of Rule 51 and the consequent errors which poured through that gaping hole in the dike of justice.

POINT II(b)

There were numerous harmful errors in the court's main charge, and petitioners were prevented from objecting to these errors by the violation of Rule 51.

"Proper Use", "Prior Safe Use" and Contributory Negligence

The trial court injected the concepts of "proper use" and "prior safe use" into the case at various points in the charge. These concepts were not proper issues in this case, and they contributed to the confusion of the jury on the issue of contributory negligence. The whole concept of "use" of the airplane by the pilots is related only to contributory negligence, which was supposed to be out of the case.

Thus, when the trial court told the jury, "Of course, it is not liable if the product is not used in a proper and intended fashion" (App. 742), and "There are many things which are reasonably fit for use which can cause an accident if they are used improperly" (App. 749), it was submitting an issue which had been foreclosed by defendant's answers to interrogatories #15, #17 and #19 (App. 22a) and by defendant's withdrawal of contributory negligence. Furthermore, there was no evidence in the record of any improper use.

The trial court also charged, "You have heard that numerous planes of this type were bought and operated" (App. 176a). This could be relevant only to prior safe use, which is not a legal defense in this case because the withdrawal of contributory negligence removed any possible foundation for prior safe use. The only conclusion which flows from prior safe use is that petitioners' dece-

dents must have been negligent if other pilots safely executed the same maneuvers. This is merely another form of stating the withdrawn contributory negligence defense.

There is authority that evidence of prior safe use or lack of prior accidents is not admissible to prove due care of a manufacturer; see *Edison* v. *Lewis Mfg. Co.*, 168 Cal. App. 2d 429, 336 P. 2d 286 (1959); Morris, *Proof of Safety History in Negligence Cases*, 61 Harv. L. Rev. 205 (1948). Even when admissible, such evidence is completely negative in character and has little probative value. In this case, its only probative value would be in connection with contributory negligence, which was withdrawn as a defense. It should also be noted that a manufacturer's duty to exercise due care includes the making of reasonable tests and inspections to discover latent defects, even without prior accidents as a warning; see 1 Frumer & Freidman, *Products Liability*, §6.01; *Guarnieri* v. *Kewanee-Ross Corp.*, 263 F. 2d 413, 270 F. 2d 575 (2d Cir., 1959); *Katz* v. *Swift & Co.*, 276 F. 2d 905 (2d Cir., 1960); *American Airlines* v. *Ford Motor Co.*, 258 App. Div. 957, 17 N. Y. S. 2d 998 (1940), aff'd 284 N. Y. 807.

Petitioners' counsel futilely requested three charges on prior safe use (Request #11, App. 203a; Request #12, App. 203a-204a; Request #21, App. 206a).

Negligent Failure to Warn

The trial court committed a very harmful error in misstating one of petitoners' most important claims:

> "Plaintiffs also allege: (2) That there was negligence in that the defendant *failed to warn of defects* in the manufacture and design which created a dangerous condition." (App. 170a; emphasis supplied.)

The claim for negligent failure to warn did not require proof of a defect. Boeing could have been held liable on this claim simply on the basis of its failure to warn of a danger in the use of its product in a certain manner, even if there were no defect in its manufacture or design. See, Annotation, 76 ALR 2d 9; *McLaughlin* v. *Mine Safety Appliance Co.*, (1962), 11 N. Y. 2d 62, 226 N. Y. S. 2d 407, 181 NE 2d 430, at p. 433, citing numerous earlier New York cases; *Alfieri* v. *Cabot Corp.*, (1st Dept., 1962), 17 App. Div. 2d 752, 235 N. Y. S. 2d 753, at p. 759, holding that:

> *"It is not essential that there be a defect in the manufacture before liability may be imposed* where, as here, the manufacturer knew the purpose for which the chattel might be used and was aware of the dangers surrounding its use under at least one of the invited conditions. In such circumstances the manufacturer has a duty to bring to the knowledge of those who are to use the chattel such directions as would make it reasonably safe for the use for which it is declared usable." (Emphasis supplied)

As detailed in Point I of this petition, the facts of this case fit squarely within the above rule. In fact, the trial court recognized that there was a valid claim for negligent failure to warn, but erroneously stated the law, so as to require proof of a defect. Petitioners specifically requested three separate and proper charges on this vital point (see plaintiffs' requests #2, #7 and #8, App. 200a; 202a), but were never given the opportunity to point out the court's error, due to the violation of Rule 51. *Nowhere in the charge was the jury told that they could find for plaintiffs on negligent failure to warn, without proof of a defect.*

Individuation of Proximate Cause

On at least four occasions, the trial court used the term "*the* proximate cause", instead of "*a* proximate cause" (App. 170a; 174a; 193a; 194a). This error was particularly harmful in view of the court's confusion of important issues of concurrent causation. Erroneous use of "the" instead of "a" under such circumstances has frequently been cause for reversal as prejudicial error; see *Sinica* v. *N. Y. Rys. Co.* (1920), 190 App. Div. 727, 180 N. Y. S. 377; *Wastl* v. *Montana Union R. Co.* (1900), 24 Mont. 159, 61 P. 9; *Lopez* v. *New York*, 4 App. Div. 2d 48, 163 N. Y. S. 2d 562; aff'd in 4 N. Y. 2d 738, 171 N. Y. S. 2d 860; *Carlock* v. *Westchester Lighting Co.*, 268 N. Y. 345, 197 NE 306; *Williams* v. *N. Y. Rapid Transit Co.*, 248 App. Div. 765, 288 N. Y. S. 778, aff'd 272 N. Y. 366, 6 NE2d 58. Petitioners futilely requested a charge on "a proximate cause" (plaintiffs' additional request #7, App. 215a).

The trial court further individuated the issue of proximate cause when it charged that "When damages in an accident are occasioned by one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, the plaintiffs are not entitled to recover unless there is affirmative evidence upon which the jury may reasonably conclude that more probably the damage was caused by the cause for which the defendant is responsible" (App. 171a). This is quite similar to the language which caused reversal in *Kendrick* v. *Piper Aircraft Corp.* (1959, CA 3 Pa.), 265 F. 2d 482.

Certification Not a Defense to Warranty

The trial court further erred by instructing the jury that it could consider government certification of the airplane as a defense to both negligence and breach of warranty:

> "Evidence of certification by the Civil Aeronautics Administration is *some evidence of due care* on the part

> of the defendant. It is not conclusive evidence that the defendant was not negligent or that due care was exercised, *but you may consider this fact,* along with other evidence in the case, *and determine for yourselves the issue of negligence and the issue of implied breach of warranty.*" (App. 175a; emphasis supplied).

While the trial court properly limited certification to being some evidence of due care, it is axiomatic that due care itself is not a defense to an action for implied breach of warranty. See, *Henningsen* v. *Bloomfield Motors Inc.* (1961), 32 NJ 358, 161 A 2d 69, 75 ALR 2d 1, at p. 13; Hursh, *American Law of Products Liability,* Vol. 1, §3:1, p. 408; Harper & James, *Law of Torts,* Vol. 2, §28.15; Prosser, *Law of Torts* (2nd Ed. 1955), §83, p. 494, n. 80 and §86, p. 523; *Goldberg* v. *Kollsman Instrument Corp., et al.,* 12 N. Y. 2d 432.

The matter was perhaps best stated by Mr. Paul Coie [one of the counsel for Boeing in the trial below] in his address at the annual meeting of the American Bar Association:

> "Under a warranty theory the manufacturer is liable without fault. He has lost his defenses of state of the art, standard of care and *the reasonable vigilance implicit in certification by the federal government.*" (Proceedings, A.B.A. Insurance, etc., Section, 1961, p. 295; emphasis supplied)

While the trial court at other places in the charge did point out some of the differences between negligence and warranty, it submitted to the jury the question of certification in connection with both negligence and warranty, and instructed the jury to consider the fact of certification in determining the issue of breach of implied warranty.

Furthermore, petitioners specifically requested charges that certification was not a defense to warranty (plaintiffs' request #19, App. 206a; and additional request #8, App. 215a), and specifically called the court's attention to this error by orally requesting #19, even though this had to be done within hearing of the jury. Nevertheless, the court refused to charge plaintiffs' request #19, and therefore flatly refused to correct its error concerning the effect of certification (App. 191a-192a). *Nowhere in the charge was the jury told that certification was not a defense to breach of warranty.*

Contributory Negligence Revived and Confused

The trial court again confused the issue of contributory negligence by charging:

> "In order to find a verdict for the plaintiffs, you must find that they have established by a fair preponderance of the evidence, that the decedents were killed in this crash by an accident which was caused or contributed to by negligence on the part of Boeing, or by a breach of an implied warranty of reasonable fitness on the part of Boeing. *If you find that the plaintiffs have established these facts by a fair preponderance, they you may determine that Boeing is liable*, and then you proceed to a consideration of damages." (App. 177a; emphasis supplied)

Clearly, if the jury found the facts listed by the court, they *must* have found for plaintiffs. The use of "may" instead of "must" was error, and although such an error might be inconsequential in some cases, it must be viewed here against the background of repeated error and confusion on the issue of contributory negligence, brought about by the court's refusal to comply with Rule 51. A

juror hearing that under such circumstances he "may" find against Boeing, could well conclude that even if all these facts were established by plaintiffs, they could still be defeated by contributory negligence. In fact, under the circumstances stated in the above-quoted charge, *only* contributory negligence could prevent the petitioners from getting the jury's verdict. Petitioners futilely requested a "must" charge (plaintiffs' request #17, App. 205a).

The trial court later compounded this error during the prejudicial colloquy after the main charge, by stating that "If a cause was the fault of Boeing, why Boeing *can* be liable" (App. 195a, emphasis supplied). Again, Boeing "*must*" be liable under such circumstances, unless contributory negligence was a defense in the case.

For cases on the erroneous use of "may" instead of "must", see, *Chesapeake & O.R. Co.* v. *Pulliam* (1947), 185 Va. 908, 41 SE 2d 54; *Davis* v. *Fire Creek Fuel Co.*, (1959), 144 W. Va. 537, 189 SE 2d 144, at p. 152.

At the very least, the foregoing errors in the main charge, coupled with those in the prejudicial colloquy after the main charge, left the jury in confusion as to vital issues, which confusion alone is ground for reversal; *DeLima* v. *Trinidad Corp.*, (1962 CA 2 NY), 302 F. 2d 585, at 587.

POINT II(c)

The trial court erred prejudicially in refusing to charge numerous requests submitted in writing by petitioners, on which argument was prevented by the trial court's violation of Rule 51.

Petitioners submitted a total of 34 written requests to charge, consisting of 26 "requested instructions" numbered "1" through "26" (App. 200a-208a), and eight "additional requested instructions" numbered "1" through "8" (App. 209a-211a; 215a-216a). Petitioners claimed as error in the Court below the failure to charge requests numbered 2, 5, 7, 8, 11, 12, 14, 15, 17, 19 and 21 of the initial group (App. 200a-206a), and additional requests numbered 4, 5, 6, 7 and 8 of the additional group (App. 209a-210a; 215a-216a).

Many of the subjects of these requested instructions have been covered in the preceding portions of this petition. Therefore, this Point II(c) will be limited to a short statement of the points involved, and new matter not previously covered.

Again, petitioners were prevented from arguing in support of these requested charges by the trial court's violation of Rule 51. Two of the important charges (requests numbered 11 and 19, App. 203a and 206a) were requested orally in the jury's presence and were refused by the trial court (App. 191a-192a). The last four "additional requests" were also supported by a written memorandum explaining their importance (App. 212a-214a).

Negligent Failure to Warn

Requests #2, #7 and #8 (App. 200a; 202a), deal with negligent failure to warn. If these charges had been given,

the court would have avoided its error in charging that negligent failure to warn required proof of a defect (App. 170a; see Point II(b) of this petition and see also *DeVito* v. *United Air Lines, Inc.*, (DC EDNY, 1951) 98 F. Supp. 88). *Nowhere in the charge did the court state that defendant could be liable without proof of a defect.*

Prior Safe Use and Contributory Negligence

Requests #11, #12 and #21 (App. 203a-204a; 206a) deal with prior safe use. No. 11, which was specifically requested orally despite the risks created by the court's violation of Rule 51, read:

> "I further charge you that evidence that this aircraft was safely operated on prior occasions is not evidence that negligence on the part of any of the decedents contributed to the crash." (App. 203a; denied by trial court at App. 191a).

In view of the fact that the main argument used by Boeing was that prior safe use indicated the necessity of contributory negligence by the crew members, this request #11 should have been given. It would have done much to clear up the confusion on contributory negligence and prior safe use, as would requests #12 and #21.

Certification as a Defense to Warranty

Petitioners' request #19 read:

> "Evidence of certification of this aircraft by the Civil Aeronautics Administration to show due care on the part of Boeing is not relevant to the issue of warranty and is not to be considered in determining whether or not the defendant breached its warranty of fitness." (App. 206a).

This charge was specifically requested orally despite the necessity of doing so within hearing of the jury, and was denied by the trial court (App. 191a-192a). Additional request #8 (App. 215a) was equally pertinent:

> "While I have told you that you may consider certification of this aircraft by the Civil Aeronautics Administration in connection with plaintiffs' claims of negligence, I instruct you that you may not consider such certification as a defense to plaintiffs' claims for breach of warranty."

Instead of these charges, the court instructed the jury that they could consider certification in connection with both negligence and warranty (App. 175a), which is clearly contrary to law (see Point II(b) of this petition).

Contributory Negligence

Additional requests #5 and #6 attempted to clear up the prejudicial atmosphere of contributory negligence which hovered about the case:

> "#5. Contributory negligence on the part of the crew members (Swain, Freeman, Jeberjahn, Job and Anderson) is not claimed by defendant in this case, and therefore contributory negligence is not an issue in this case.
>
> 6. If you have seen or heard anything during this trial which indicated to you that there was a claim or an issue of contributory negligence on the part of the crew members (Swain, Freeman, Jeberjahn, Job and Ansderson), you are to put it out of your minds and you are not to consider it in reaching your verdict." (App. 215a).

Such instructions were vitally necessary in this case, especially after Boeing's reliance on contributory negligence in opening (App. 18a) and summation (App. 161a-166a), and the hopeless confusion caused by the court's violation of Rule 51 through the colloquy about contributory negligence conducted within full hearing of the jury. Contributory negligence remained in the case throughout all the testimony, being withdrawn only after petitioners' motions at the end of defendant's case. Under these circumstances, petitioners were entitled to a charge clarifying this vital withdrawn issue; see, *Chicago & N. W. Ry. Co.* v. *Garwood*, 167 F. 2d 848 (8th Cir., 1948), in which a new trial was granted after the trial court's failure to instruct under similar circumstances.

Breach of Warranty

Petitioners' request #17 and additional request #7 deal with definition of breach of warranty (App. 205a and 215a). If these instructions had been given, they would have avoided the trial court's erroneous use of "may" instead of "must", and "the" instead of "a", as discussed in Point II(b) of this petition.

Burden of Proof

Petitoners' request #5 (App. 201a) contains much routine language of instructions on burden of proof in New York death cases; yet, much of it was not given by the trial court. Specifically, in view of the great confusion in the court's main charge and subsequent prejudicial colloquy, the following routine charge from petitioners' request #5 should have been given:

> "The plaintiffs need not prove their case beyond a reasonable doubt, that is the rule only in criminal cases to prove guilt. I further charge you that under

> the law of New York in a death action, such as these cases, the plaintiff is not held to the high degree of proof required in a case where the injured person may take the stand and give his version of the happening of the accident." (App. 201a).

This charge is supported by *Noseworthy* v. *City of New York*, 298 N. Y. 77 (1948), and *Anderson* v. *Bee Line*, 1 N. Y. 2d 169. While it may not be mandatory to give this charge in all death cases, it certainly should have been given in this case when requested, in view of the dire confusion of the jury on the basic issues of the case.

Sole Proximate Cause

Petitioners' request #14 (App. 204a) dealt with sole proximate cause, and should have been given in view of the court's complete confusion of the issues of concurrent causation. See, *Foley* v. *State* (1943), 265 App. Div. 682, 41 N. Y. S. 2d 256, at pp. 259, 260; *DiSabato* v. *Soffes* (1959), 9 A. D. 2d 184, 193 N. Y. S. 2d 184 at p. 193.

State of the Art

Petitioners' request #15 read:

> "It is no defense to plaintiffs' claims that the defendant conformed with the state of the art or standard of the airplane industry. The standard of care is, as I previously instructed, reasonable care under all the circumstances prevailing." (App. 204a)

This charge would be correct, even as to the negligence claims, under *The T. J. Hooper*, 60 F. 2d 737 (2nd Cir. 1932); *Diesbourg* v. *Hazel Atlas Glass Co.*, (1949, CA 3 Pa.), 176 F. 2d 410, at p. 412; *U. S. Radiator Corp.* v. *Henderson*, (1933, CA 10 Colo.) 68 F. 2d 87 at p. 92. It

was particularly important in connection with the claims for breach of implied warranty, wherein care itself was not an issue. The trial court gave no instruction on state of the art, although it did mention that Boeing contended state of the art as a defense (App. 170a), thus leaving the jury in further confusion.

Confusion of Negligence and Warranty

The trial court's charge made little distinction between negligence and warranty, and in fact made the grievous error of presenting certification as a defense to both negligence and warranty (App. 175a). Petitioners' additional request #4 (App. 209a-211a) was an attempt to separate the verdicts on these issues so that the jury would understand the important distinctions involved. While the court had discretion under Rule 49(a) of the Rules of Civil Procedure, the granting of petitioners' additional request #4 would have mitigated some of the court's prior errors and confusing statements about negligence and warranty. Again, confusion on an important issue is, in itself, grounds for reversal, *DeLima* v. *Trinidad Corp.*, (1962, CA 2 NY) 302 F. 2d 585, at p. 587.

CONCLUSION

It is respectfully submitted that the trial court's violations of Rule 51 in flatly refusing the requests of petitioners' counsel to make his objections to the court's charge outside the hearing of the jury were, in themselves, reversible error and clearly affected the substantial rights of petitioners since they caused petitioners, through their counsel, to be cast in a prejudicial role of antagonism and contention at the most crucial phase of the trial. Such violations of Rule 51 were, in the context of this case, also prejudicial in that: (1) They brought about a highly prejudicial colloquy within the hearing of the jury, during which the withdrawn issues of contributory negligence were put back into the case; (2) They prevented petitioners' counsel from making specific objections to numerous errors in the main charge; and (3) They deprived petitioners' counsel of the opportunity to argue in support of many of petitioners' written requests to charge which the trial court did not give. Many of these requested charges were needed to cure the errors in the court's own charge.

The Court below perpetuated the prejudicial errors by its erroneous application of the "harmless error" statute and by its conclusion, without discussion, that petitioners were not prejudiced by the trial court's conceded violations of Rule 51.

PRAYER

For the foregoing reasons, petitioners pray that this petition be granted to the end that these cases may be reviewed and determined by this Court; that the judgment of the Court of Appeals be reversed with direction that the cases be remanded to the District Court for a new trial on all issues, and that petitioners be granted such other and further relief as may be proper.

Respectfully submitted,

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APPENDIX

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 17—September Term, 1964.

(Argued September 28, 1964 Decided October 27, 1964.)

Docket No. 28843

LORENE M. SWAIN, as Executrix of the Last Will and Testament of WILLIAM T. SWAIN, deceased, *et al.*,

Plaintiffs-Appellants,

—v.—

BOEING AIRPLANE COMPANY,

Defendant-Respondent.

Before:

FRIENDLY, KAUFMAN and MARSHALL,
Circuit Judges.

Plaintiffs in wrongful death actions against an airplane manufacturer appeal from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *Judge*, dismissing their complaints after a verdict for the defendant. Affirmed.

WILLIAM F. X. GEOGHAN, JR. (Speiser, Shumate, Geoghan & Law, New York, New York) (Stuart M. Speiser, William L. Shumate and Alfred W. Gans, of Counsel), *for Plaintiffs-Appellants.*

BENJAMIN E. HALLER (Mendes & Mount, New York, New York), *for Defendant-Appellee.*

FRIENDLY, *Circuit Judge*:

The personal representatives of five American Airlines employees, killed in a training flight of a Boeing 707-123 jet airplane over Long Island in 1959, brought actions for wrongful death against the Boeing Airplane Company in the District Court for the Southern District of New York—federal jurisdiction being predicated on diverse citizenship. Plaintiffs contended that the initial design of the tail, rudder and rudder controls of the airplane was defective; and that Boeing was liable for negligence in design and for failure to give adequate warning of the characteristics of the airplane, and also on a theory of a manufacturer's strict liability for a defective product, see *Goldberg* v. *Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 240 N. Y. S. 2d 592 (1963). Their actions, tried before the late Judge Dawson and a jury, resulted in a verdict for the defendant, upon which the court entered judgments dismissing the complaints.

Boeing suggested at the trial that the plane had been put into too violent a maneuver even for a training flight or had been flown unskillfully. Although Boeing had pleaded contributory negligence, its counsel withdrew that defense on the basis that "we don't know which of the men was flying this airplane"—of which the decedents had been

the sole occupants—"and we have not sought to sustain the burden of proving contributory negligence as to any one particular decedent." Appellants assert that, in the absence of any explanation for the accident independent of the conduct of the decedents, this concession entitled them to a directed verdict and, in the alternative, that the judge erred in permitting the jury to consider the possible misuse of the airplane. However, even under the principle of strict liability the manufacturer is liable only if the plaintiff proves the accident was caused by delivery of the article in a "defective condition," which is to say not "safe for normal handling and consumption." ALI, Restatement (Second), Torts §402(A)(1) & comment h (Tent. Draft No. 10, 1964). The inference of the existence and the causality of a defect would indeed be bolstered if the manufacturer admitted that improper use played no part in the accident. But Boeing's withdrawal of the contributory negligence defense for lack of affirmative proof as to who was misusing the plane in no way conceded that the plane was not being misused; it remained for the jury to decide whether the plaintiffs had sustained their burden of showing that the crash was due to a defect rather than to negligent operation or some other cause for which the manufacturer would not be responsible.

The other serious complaint is that the judge violated the final sentence of F. R. Civ. P. 51 requiring that opportunity shall be given to object to the charge out of the hearing of the jury. After concluding the charge the court inquired whether there were any exceptions. Appellants' counsel asked, "May we approach the bench, your Honor?", to which the court replied, "No. Are there any exceptions to the charge?" Counsel then sought and received permission to confer with an associate, after which he took exceptions and made requests in the presence of the jury.

Appellants' counsel says that the judge should have understood his request as invoking the final sentence of F. R. Civ. P. 51, citing *Cosper* v. *Southern Pacific Co.*, 298 F. 2d 102, 104 (9 Cir. 1961), where this precise form of address was endorsed. In an opinion denying post-verdict motions, Judge Dawson explained that he had not so understood the remark in the total setting and that if a specific "request had been made, the Court, with counsel, would have retired to the robing room." Fully accepting this and agreeing that counsel could well have made specific reference to the Rule, we nevertheless believe that the request was sufficient and that counsel was warranted in thinking that permission to take exceptions out of the hearing of the jury had been denied; we agree with other circuits that trial judges should be alert to further the important objective of the final sentence of Rule 51. See *Downie* v. *Powers*, 193 F. 2d 760, 767 (10 Cir. 1951); *Swift* v. *Southern R.R.*, 307 F. 2d 315, 320-21 (4 Cir. 1962). But it does not follow that a failure to comply with that direction automatically requires reversal: the harmless error statute, 28 U. S. C. §2111, embodies a policy at least as important. As said by Judge Haynsworth in the *Swift* opinion just cited, when the court has failed to give the opportunity required by the last sentence of Rule 51, the deprived party may fairly be relieved "of that portion of the rule which prohibits assignments of error, directed to the charge, unless the required objection has been sufficiently made"; moreover, reversal will also be called for if there is reasonable basis for concluding that the colloquy had in the presence of the jury as a result of the judge's ignoring or denying a proper request was prejudicial. Examining the charge and the colloquy in this light, we find no ground for reversal.

Appellants' other points have been carefully weighed, but do not require discussion.

Affirmed.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[Stamp—U. S. District Court—Filed Dec. 4, 1964—S. D. of N. Y.—Docketed as a Judgment #66,971 on Dec. 7, 1964 at 10:25 A.M.]

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of October one thousand nine hundred and sixty-four.

Present:

HON. HENRY J. FRIENDLY,
HON. IRVING R. KAUFMAN,
HON. THURGOOD MARSHALL,

Circuit Judges.

60 Civ. 2278

LORENE M. SWAIN, as Executrix of the Last Will and Testament of WILLIAM T. SWAIN, Deceased,

Plaintiff-Appellant,

—v.—

BOEING AIRPLANE COMPANY,

Defendant-Appellee.

60-2493

KATHRYN S. FREEMAN, as Administratrix of the Estate of EDGAR A. FREEMAN, Deceased,

Plaintiff-Appellant,

—v.—

BOEING AIRPLANE COMPANY,

Defendant-Appellee.

60-4912

RETA JEBERJAHN, as Executrix of the Last Will and Testament of FRED W. JEBERJAHN, Deceased,

Plaintiff-Appellant,

—v.—

BOEING AIRPLANE COMPANY,

Defendant-Appellee.

61-2906

DOROTHY G. JOB, as Executrix of the Last Will and Testament of HARRY C. JOB, Deceased,

Plaintiff-Appellant,

—v.—

BOEING AIRPLANE COMPANY,

Defendant-Appellee.

Judgment of Court of Appeals

61-2907

MARION ANDERSON, as Administratrix of the Goods, Chattels and Credits of ARTHUR ANDERSON, Deceased,

Plaintiff-Appellant,

—v.—

BOEING AIRPLANE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

A true copy,

A. DANIEL FUSARO
Clerk

Opinion of District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Actions
60 Civ. 2278
60 Civ. 2493
60 Civ. 4912
61 Civ. 2906
61 Civ. 2907

LORENE M. SWAIN, as Executrix of the Last Will and Testament of WILLIAM T. SWAIN, Deceased,

Plaintiff,

—VS.—

BOEING AIRPLANE COMPANY,

Defendant.

And Four Other Cases.

MEMORANDUM

DAWSON, *D.J.*:

This is a motion for an order setting aside the jury verdict for the defendant entered in the within actions and for the entry of a judgment, notwithstanding the verdict, in favor of the plaintiffs.

The actions were actions at law; they were tried to the jury. The jury rendered a verdict for the defendant in each of the five cases.

The instant motion is predicated on the ground that there was no issue for the jury and that plaintiffs were entitled to directed verdicts on the question of liability.

Plaintiffs' counsel reach this strange conclusion on the ground that because there was no issue of contributory negligence it must necessarily follow that the defendant was liable in the case. This completely misconceives the issue in the case. Plaintiffs brought the actions on the basis of negligence and breach of an implied warranty of fitness. Their claim was that there was a defect in the design of the plane which crashed and failure to warn by defendant of the danger of using such plane. This was the issue they presented. It was an issue on which the plaintiffs had the burden of proof. A defense of contributory negligence would, of course, be an affirmative defense on which the defendant would have the burden of proof. The defendant made no such contention. It was obvious that it could not do so because there was no proof as to which of the five decedents was flying the plane. The fact that the issue of contributory negligence was taken out of the case does not mean that as a result thereof plaintiffs had established their burden of proof. The issue still remained as to whether a cause of the crash was a defect in the plane or a failure to warn. This was the issue which was submitted to the jury. It was properly so submitted because it was an issue in the case upon which the jury had to rule. To contend that plaintiffs must necessarily get the verdict because the defendant did not press a defense of contributory negligence is a complete non sequitur.

Plaintiffs also seek a new trial on the ground that the opportunity should have been given to the plaintiffs to make objections to the charge out of the hearing of the jury. Plaintiffs' counsel asked for no such opportunity. If

he had asked for it it would have been granted pursuant to Rule 51 of the Rules of Civil Procedure.

After the charge had been completed, the Court asked whether there were any exceptions to the charge. Mr. Geoghan then said: "May we approach the bench, your Honor?" The Court said: "No. Are there any exceptions to the charge?" Mr. Geoghan then stated: "We did submit a list of written charges. I assume they will be marked as a court exhibit, just for the record." The Court replied: "They will be marked as a court exhibit, and I have incorporated the substance of a great number of them, not in your language but in my own language." Mr. Geoghan then said: "That is correct. I think there may be a few—" (R. p. 771).

Obviously, Mr. Geoghan was objecting to failure to grant some of his proposed requests to charge. The Court then said: "If there is any exception to anything I omitted that you think is substantial, let me know now. What is it?" (R. pp. 771-772).

Mr. Geoghan then particularly excepted to failure to charge certain requests submitted by him. The Court ruled upon his exceptions, granting some of them and denying some of them. He made no other objections to the charge. He then said: "I think that is all. Thank you, your Honor." (R. p. 773).

A request to approach the bench is not a request to make objections to a charge out of the presence of the jury. If such request had been made, the Court, with counsel, would have retired to the robing room. The Court had no indication of what Mr. Geoghan had in mind. He, apparently, had in mind objections to the Court's failure to charge some of his proposed requests to charge. His objections were

ruled upon by the Court and when that had been done Mr. Geoghan said: "That is all."

This was a proper compliance with Rule 51.

Insofar as the motion relies upon objections to failure to grant Mr. Geoghan's requested charges, those issues properly should be disposed of on appeal.

The motion is denied. So ordered.

Dated: New York, N. Y.
January 31, 1964

ARCHIE O. DAWSON
U.S.D.J.

Office-Supreme Court, U.S.
FILED
FEB 19 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 854

LORENE M. SWAIN, as Executrix of the Last Will and Testament of WILLIAM T. SWAIN, Deceased,

and

KATHRYN S. FREEMAN, as Administratrix of the Estate of EDGAR A. FREEMAN, Deceased,

and

RETA JEBERJAHN, as Executrix of the Last Will and Testament of FRED W. JEBERJAHN, Deceased,

and

DOROTHY G. JOB, as Executrix of the Last Will and Testament of HARRY C. JOB, Deceased,

and

MARION ANDERSON, as Administratrix of the Goods, Chattels and Credits of ARTHUR ANDERSON, Deceased,

Petitioners,

v.

BOEING AIRPLANE COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below—Jurisdiction

Respondent accepts the identification of the opinions below and the statement of the grounds of jurisdiction of this Court contained in the petition.

Counter-statement of Questions Presented:

1. Did the Court of Appeals err in holding that the failure of the District Court to hear objections to the charge in the absence of the jury as required by Rule 51 of the FRCP did not require reversal in the absence of prejudice to petitioners' substantial rights within the meaning of the "harmless error" statute, 63 Stat. 110, 28 U.S.C. § 2111?

2. Did the Court of Appeals err in holding that petitioners' substantial rights were not prejudiced by the charge as given by the District Court?

3. Did the Court of Appeals err in holding that petitioners' substantial rights were not prejudiced by colloquy in the jury's presence regarding objections to the District Court's charge?

Rules and Statutes Involved:

In addition to Rule 51 of the Federal Rules of Civil Procedure, 28 U.S.C., and the "Harmless Error" statute, 28 U.S.C. § 2111, cited by petitioners, the case involves Rule 61 of the Federal Rules of Civil Procedure:

> "Rule 61. Harmless Error.
>
> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

Statement of Case

Petitioners sued for the wrongful death of five employees of American Airlines, Inc. ("American") who comprised the crew of an aircraft owned by American and manufactured by respondent ("Boeing"), which crashed during a training flight on August 15, 1959, near Calverton, New York.

There was no evidence of any malfunction of any equipment on the aircraft (Petition, p. 11).

Petitioners claimed:

(1) That the aircraft was inherently defective in design, having insufficient control capability to cope with a standard training maneuver involving simulated failure of two of the four engines, and that the alleged defect was the result of Boeing's negligence or breach of an implied warranty of fitness (Petition, pp. 5-6).

(2) That Boeing was negligent in failing properly to warn American regarding the aircraft's characteristics (Petition, p. 6).

The verdict for Boeing (App. 199a) was an implicit finding by the jury that petitioners had failed to establish that the accident was caused or contributed to by defective design of the aircraft or by any negligent failure of Boeing to warn of its characteristics.

There was substantial evidence to support the verdict. The aircraft had been duly certified as complying with the relevant requirements of the Civil Aeronautics Administration (App. p. 168a). It was capable of safely performing the "two-engine out" maneuver (Reedholm, App. 263a-264a). Boeing had fully informed American of its characteristics (Waddell, App. 275a, 294a-295a). American had accepted delivery of the aircraft only after flight testing it with regard to the characteristics now complained of (App. 305a-307a).

At the end of the evidence Boeing withdrew the affirmative defense of contributory negligence, there having been no positive evidence identifying which of the decedents were at the controls (App. 152a).

At the conclusion of the charge the trial court declined a request by petitioners' trial counsel to "approach the bench" and heard argument in the presence of the jury on certain objections to the charge as given and on requests for further instructions (App. 190a). Petitioners' counsel registered no objection at the trial to this procedure.

The Court of Appeals affirmed, holding that notwithstanding the withdrawal of the affirmative defense of contributory negligence "it remained for the jury to decide whether the plaintiffs had sustained their burden of showing that the crash was due to a defect rather than to negligent operation or some other cause for which the manufacturer would not be responsible" (Petition, p. 55).

The Court of Appeals expressed agreement with other circuits "that trial judges should be alert to further the important objective of the final sentence of Rule 51". It held, however, that even considering objections which had not been noted at the trial the charge gave no ground for reversal and that the colloquy in the jury's presence was not prejudicial (Petition, p. 56).

ARGUMENT

I. The case presents no novel or important question regarding the application of Rule 51.

It has been uniformly held that non-compliance with the letter of Rule 51 is not reversible error where no prejudice results.

Levin v. *Joseph E. Seagram & Sons, Inc.*, 158 F. 2d 55, 58, 7 CA, 1946;

Gwinnett v. *Albatross S. S. Co., Inc.*, 243 F. 2d 8, 9-10, 2 CA, 1957;

Hardigg v. *Inglett*, 250 F. 2d 895, 897, 4 CA, 1957;
Luther v. *Maple*, 250 F. 2d 916, 920, 8 CA, 1958;
Garland v. *Material Service Corp.*, 291 F. 2d 861, 863, 7 CA, 1961;
Swift v. *Southern Railway Co.*, 307 F. 2d 315, 320-1, 4 CA, 1962.

As these authorities illustrate, the requirements of Rule 51 are not excepted from the application of the "Harmless Error" statute, 28 U.S.C. § 2111, or of Rule 61.

The court below, for the purpose of its decision, accepted petitioners' contention that their counsel "was warranted in thinking that permission to take exceptions out of the hearing of the jury had been denied" and agreed that "judges should be alert to further the important objective of the final sentence of Rule 51" (Petition, p. 56). Accordingly it turned its attention to two questions: First, did the charge contain reversible error, whether or not sufficient objection was made? Second, was the colloquy held in the presence of the jury prejudicial to petitioners? If, as the court held, the trial record justified a negative answer to these questions, technical non-compliance could not have affected the substantial rights of the petitioners.

Respondent submits that this approach was harmonious with the plain meaning of Rule 51 when read in conjunction with 28 U.S.C. § 2111 and Rule 61 and with the interpretation placed upon Rule 51 by Courts of Appeals in the past.

II. The Court of Appeals held correctly that the petitioners were not prejudiced by the charge.

The only recorded exceptions were to the court's failure to charge petitioners' requests numbered 11 and 19 in the language requested (App. 190a-193a).

Requested instruction No. 11 read as follows:

> "11. I further charge you that evidence that this aircraft was safely operated on prior occasions is not evidence that negligence on the part of any of the decedents contributed to the crash" (App. 203a).

The requested instruction is supported by no cited authority and is contrary to elementary logic. As petitioners have stated, "The only conclusion which flows from prior safe use is that petitioners' decedents must have been negligent if other pilots safely executed the same maneuvers" (Petition, pp. 38-9).

Petitioners' attack was on the design of the airplane, there being no evidence of physical failure or malfunction of any part (Hogue, App. 44a). It was open to Boeing to resist this attack by showing that the occurrence did not compel the inference that the design was defective. In considering whether the largely unexplained accident might have been caused by some error of those operating the airplane, rather than by an alleged inherent design deficiency, the first question to occur is: Was the airplane of such a design that the maneuver in question could be performed without accident by crews of normal competence? No evidence could be more relevant to this question than the history of safe operation of this and identical airplanes on numerous occasions involving similar maneuvers.

Requested instruction No. 19, which the court declined to charge, was as follows:

> "19. Evidence of certification of this aircraft by the Civil Aeronautics Administration to show due care on the part of Boeing is not relevant to the issue of warranty and is not to be considered in determining whether or not the defendant breached its warranty of fitness" (App. 206a).

Under the court's charge the standard to be applied to the breach of warranty claim was one of reasonable fitness (App. 173a, 177a). Where breach of warranty is claimed solely on the basis that the design of the airplane is not reasonably fit for its intended use, approval of such design by the duly appointed federal authority is obviously just as relevant to the breach of warranty claim as to the claim of negligence. Logically the relevance of certification to the claim of negligent design is that it tends to prove the reasonableness of the design, the very point to be proved on the warranty issue. If, as apparently conceded, type certification is evidence of reasonable care in the design, it must necessarily be evidence that the design was reasonable.

In the Court of Appeals petitioners raised numerous objections to the charge which they contended they had not had proper opportunity to make at the trial. The court below held that petitioners might be relieved of the requirement that objections to the charge be sufficiently made. Examining the charge "in this light" it found no ground for reversal (Petition, p. 56).

Thus, affirmance was not predicated on the failure of counsel to make timely objection to the charge, but on the correctness of the charge as given.

The further objections to the charge first raised and considered on appeal and restated in the petition are without merit. In general they may be considered in three categories:

> 1. The asserted failure to charge that plaintiffs were entitled to recover if some breach of duty by defendant was a concurrent or contributing proximate cause of the accident.

The question of concurrent causes was fully dealt with in the main charge and in the court's supplementary instructions.

The court charged the jury:

> "The jury will have to consider whether a contributing cause of the accident was because of the negligence of Boeing in the design and manufacture of the plane; that is the first issue on liability." (App. 173a)
>
> • • •
>
> "In order to find a verdict for the plaintiffs, you must find that they have established by a fair preponderance of the evidence that the decedents were killed in this crash by an accident which was caused or contributed to by negligence on the part of Boeing, or by a breach of an implied warranty of reasonable fitness on the part of Boeing." (App. 177a)

In amplifying its main charge, at the request of petitioners' counsel, the court further stated:

> "What you are asking me to say there is something that I think I said in my charge, but if there is a doubt in your mind I will say it again, on the issue of negligence you do not have to find that the defendant's negligence was the sole cause of the crash. If you find that negligence was a contributing cause for the crash, then of course the negligence would create a cause of action in behalf of the plaintiffs.
>
> "In other words, it does not have to be the only thing that happened, but if negligence or breach of warranty was one of the causes of the crash, why, then, of course, the plaintiffs have made out their cause of action." (App. 191a)

This categorical instruction that "• • • if negligence or breach of warranty was one of the causes of the crash, why, then of course, the plaintiffs have made out their cause of action", removed any shadow of doubt as to whether petitioners had to go beyond proving that some breach of duty by Boeing merely contributed.

Later the court again stressed the same point when it said:

> "I mean, in order for the plaintiffs to recover they have to establish the contributing cause of the crash was a defect in the plane or a resultant negligence or breach of the implied warranty." (App. 193a)

Finally the following exchange took place between the court and petitioners' counsel:

> "Mr. Geoghan: In other words, your Honor did instruct the jury that if there were concurrent causes and one of them was negligence, then the verdict would be in favor of the plaintiff, and I request that in view of the discussion here about the operation of plane.
>
> The Court: I do not understand what you are driving at. I do not know what you want.
>
> Mr. Geoghan: Well, there has been a discussion here about the operation of the plane being the cause of this accident, and I just wanted to request again, if there are concurrent causes and one of them spells breach of warranty of [or] negligence—
>
> The Court: If a cause was the fault of Boeing, why Boeing can be liable.
>
> Mr. Geoghan: That is all." (App. 195a)

This was the court's final pronouncement on the subject. Counsel's remark "That is all" can only mean that he was content with it.

The passages of colloquy just quoted show that the court resolved, to counsel's avowed satisfaction, any possible uncertainty which may have been caused by the use of a permissive expression earlier in the charge, i.e., "you may determine that Boeing is liable." (App. 177a)

Relying upon *Kendrick* v. *Piper Aircraft Corp.*, 265 F. 2d 482, 3 CA, 1959, petitioners complain of the following

language appearing in the early portion of the main charge:

> "When damages in an accident are occasioned by one of two causes, for one of which the defendant is responsible and for the other of which he is not responsible, the plaintiffs are not entitled to recover unless there is affirmative evidence upon which the jury may reasonably conclude that more probably the damage was caused by the cause for which the defendant is responsible." (App. 171a)

This part of the charge plainly dealt with the question of distinct and separate causes, not with concurrent causes. In this context it was correct.

> 2. Instructions to the effect that if the accident were caused by negligent operation of the airplane petitioners were not entitled to recover.

Petitioners' argument that the court "revived" the defense of contributory negligence overlooks the fundamental nature of contributory negligence as an affirmative defense and the effect of its withdrawal.

As an affirmative defense, contributory negligence would have no pertinence unless it were first established that Boeing's negligence or breach of warranty was at least a contributing cause of the accident. To determine that issue it was necessary to consider whether (in the absence of more direct evidence of causation) the circumstances of the accident made it more probable that causation involved some breach of duty by Boeing than that it did not. Therefore petitioners had the burden of showing the relative improbability of alternate causes of the accident, suggested by the circumstances, for which Boeing was not responsible. As the New York Court of Appeals said in *Bourcheix* v. *Willow Brook Dairy, Inc.*, 268 N. Y. 1, 7: "When some other cause might have existed plaintiff is bound to exclude it."

A "contributory negligence" charge would tell the jury that even though it found that Boeing's negligence caused the accident, it must return a verdict for Boeing if it also found that decedents' negligence contributed. (See suggested charge Civ. 4.23, 28 F.R.D. 438.) The charge in the present case carried no such implication.

Petitioners persist in the fallacy that Boeing admitted that there was no negligence in the operation of the aircraft. The answers to interrogatories quoted at pages 9-10 of the petition are no more than denials of knowledge.

Boeing never admitted that there was no negligence in the operation of the plane. It admitted only that it could not prove which individual was negligent (App. 152a).

The withdrawal of the defense of contributory negligence meant only that if the jury found that the crash was caused both by a breach of duty by Boeing and by negligence of one or more decedent, petitioners would prevail.

If the jury were to find the crash could as readily as not be accounted for by negligent operation without any negligence or breach of warranty by Boeing contributing thereto, a verdict for Boeing must follow, not on the ground of contributory negligence but on the ground that plaintiffs had simply not sustained their burden of proof. The only "confusion" surrounding the contributory negligence issue was that generated by the failure of petitioners' counsel to appreciate this fact.

The Court of Appeals correctly stated:

> "But Boeing's withdrawal of the contributory negligence defense for lack of affirmative proof as to who was misusing the plane in no way conceded that the plane was not being misused; it remained for the jury to decide whether the plaintiffs had sustained their burden of showing that the crash was due to a defect rather than to negligent operation or some other cause for which the manufacturer would not be responsible." (Petition, p. 55)

A further fallacy is petitioners' statement that contributory negligence was "the only defense presented by Boeing" (Petition, p. 9). Boeing consistently denied that any negligence or breach of warranty on its part either caused or contributed to the accident. Denial of any causally related breach of duty is certainly a sufficient defense.

3. The asserted failure to charge adequately regarding the claim of negligent failure to warn.

The District Court charged:

> "It is the law, of course, that a manufacturer has a duty to adequately warn foreseeable users of its products of foreseeable and latent dangers attendant upon the proper and intended use of its product." (App. 170a)

Petitioners cannot show prejudice in connection with the alleged failure to warn because they proved no case on this point. There was no evidence that American, the purchaser, was ignorant of the relevant characteristics of the airplane. There was ample evidence that it was fully informed (Reedholm, App. 257a-258a; Waddell, App. 275a, 294a-295a). 'Where the vendee and user has actual knowledge of the characteristic complained of the manufacturer's alleged failure to warn cannot be the proximate cause of the loss. *McLaughlin* v. *Mine Safety Appliance Co.*, 11 N. Y. 2d 62, 1962.

III. The Court of Appeals held correctly that petitioners were not prejudiced by colloquy in the jury's presence regarding objections to the charge.

The court below also examined the record in the light of the question whether "there is reasonable basis for concluding that the colloquy had in the presence of the jury * * * was prejudicial" and concluded that there was not (Petition, p. 56).

The colloquy in question fills about six pages of the printed appendix (pp. 190a-196a). It contains at page 191a amplification of the main charge on the points of contributing cause and assumption of risk, rendered at the request of petitioners' counsel.

At pages 193a to 195a there is amplification of the point that if Boeing's breach of duty were merely a contributing cause, Boeing could be liable, this being the consequence of the withdrawal of the contributory negligence defense, whereas if the crash arose from causes independent of any breach of duty by Boeing, it would not be liable.

None of the colloquy significantly modified or affected the charge in chief. In tone and content it was sober, dispassionate and free of oratorical flights. At no time did petitioners' counsel intimate at the trial that he considered it prejudicial.

Respondent submits that the court below was correct in holding that the colloquy in question, freely participated in without objection by petitioners' counsel, did not prejudice their substantial rights.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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Dated: New York, N. Y., February 18, 1965.